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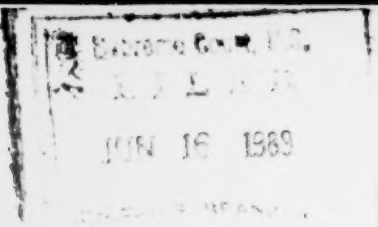

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DELTA AIR LINES, INC.,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, DONALD R. HAZELTINE and EARL E. MEECH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether benefit claims denied by the fiduciaries named in an ERISA employee benefit plan, with "final and exclusive" authority to decide all claims for benefits under the plan, may subsequently be submitted to an arbitrator for *de novo* consideration under a collective bargaining agreement merely because that agreement incorporates the plan by reference and recites certain plan terms, or must claim denials be appealed to a district court under section 502 of ERISA.

2. Whether the threshold question of an arbitrator's jurisdiction to decide claims for ERISA plan benefits may be deferred to the arbitrator, merely because the plan is incorporated into a collective bargaining agreement, or must be decided by the courts under the Supreme Court's decisions in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), and the *Steelworkers Trilogy*.

RULE 28.1 LISTING

All parties to this case are named in the caption. The following are all of the publicly owned parents, subsidiaries, and affiliates of Delta Air Lines, Inc.: Atlantic Southeast Airlines, Inc.; Comair, Inc.; SkyWest, Inc.; and Gatwick Handling, Limited.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Delta Air Lines, Inc. ("Delta"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this case on December 16, 1988.

OPINIONS BELOW

The district court denied respondents' motion for summary judgment and granted petitioner's cross-motion for summary judgment in an unreported decision on January 21, 1988 (App. B), thereby denying respondents' attempt to compel arbitration of disability benefit claims. Respondents appealed that ruling and in a decision reported at 863 F.2d 87 (D.C. Cir. 1988), issued on December 16, 1988 (App. A), the court of appeals reversed and remanded with instructions to grant respondents' request to compel arbitration. The

Petition Of Appellee, Delta Air Lines, Inc. For Rehearing And Suggestion For Rehearing *En Banc* was denied on February 16, 1989 (App. D) and this petition for certiorari followed.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1988. (App. C) Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied by the court of appeals on February 16, 1989. (App. D) On May 8, 1989, Chief Justice Rehnquist granted petitioner's application for an extension of time up to and including June 16, 1989, to file a petition for certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

A. Employee Retirement Income Security Act of 1974 (ERISA)

1. Plan and Summary Plan Description

ERISA[1] requires that all covered employee benefit plans be in writing and specify the fiduciary with the responsibility to control and manage the plan (the "named fiduciary"). ERISA § 402(a), 29 U.S.C. § 1102(a). A summary plan description ("SPD") must also be furnished to all plan participants which describes the plan in language understandable to the average participant. ERISA § 102(a), 29 U.S.C. § 1022(a). The SPD must describe, *inter alia*, "the relevant provisions of any applicable collective bargaining agreement" and "the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act.)" *Id.* at 1022(b).

2. Fiduciary Duties

Those who administer ERISA benefit plans owe a fiduciary duty to plan beneficiaries, must exercise independent

[1] The Employee Retirement Income Security Act of 1974, §§ 2 *et seq.*, 29 U.S.C. §§ 1001 *et seq.* (hereinafter "ERISA").

judgment in making plan determinations, and must operate the plan in accordance with plan documents. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). In addition, ERISA provides that employee benefit plans may contain procedures allocating responsibility for their operation and administration among named fiduciaries. ERISA § 402(b)(2), 29 U.S.C. § 1102(b)(2); ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1).

3. Claims Resolution Procedures

Section 503 of ERISA (29 U.S.C. § 1133) requires that benefit plans subject to ERISA provide reasonable claims procedures for the review of denied claims. The regulations governing ERISA also require that the "appropriate named fiduciary" responsible for the review of denied claims be either named in the plan or identified pursuant to a procedure set forth in the plan document. 29 C.F.R. § 2560.503-1(g)(2).

ERISA regulations recognize that some employees who are covered by an ERISA benefit plan will also be covered by a collective bargaining agreement which may include a clause calling for arbitration of disputes between the employer and the employee. The regulations governing section 503 authorize two alternative types of dispute resolution mechanisms for employees who are covered by an ERISA plan and a collective bargaining agreement: (1) independent claims review procedures with the right of appeal to a federal district court pursuant to section 502 of ERISA; or (2) a collectively bargained arbitration procedure for benefit claims. 29 C.F.R. § 2560.503-1. The plan's SPD must expressly set out every aspect of the claims review procedure selected. 29 C.F.R. § 2560.503-1(b)(1)(ii).[2] As such, the SPD must state whether the plan is established or maintained pursuant to a collective bargaining agreement, *i.e.*, whether such agreement "controls any duties, rights, or benefits under the plan . . . ." 29 C.F.R. §§ 2520.102-3(i), 2560.503-1(b)(1)(ii).

[2] If arbitration is the chosen dispute resolution mechanism, the SPD must so state in order for the plan to be in compliance with ERISA. 29 C.F.R. § 2560.503-1 (b) (1) (ii).

B. The Railway Labor Act

The RLA,[3] whose coverage was extended to air carriers in 1936, establishes procedures for resolving disputes that lie within its coverage. Respondents allege that this case involves a so-called "minor dispute" between the parties. A "minor dispute" under the RLA is one between an employer and its employees which involves the interpretation and application of a collective bargaining agreement. Minor disputes are to be resolved by System Boards of Adjustment established by covered employers and their employees. 45 U.S.C. § 184. In the event of a System Board deadlock, the dispute is submitted to binding arbitration. 45 U.S.C. § 153 (Second).[4]

STATEMENT OF THE CASE

This case arises from a dispute over whether the power to resolve disability benefit claims rests with fiduciaries named by the plan and the SPD as having the "exclusive," "final" and "conclusive" authority to resolve plan disputes, or with an arbitrator not named in the plan or the collective bargaining agreement as a plan fiduciary.[5] The court below reversed the district court's conclusion that the incorporation of the plan and its exclusive dispute resolution mechanism into the collective bargaining agreement constitutes an express exclusion of such disputes from arbitration. The court of appeals held that the general arbitration procedure of the collective bargaining agreement may give an arbitrator jurisdiction to award plan benefits, notwithstanding the plan's express provisions, *because* of the plan's incorporation by reference into the collective bargaining agreement and the recitation of certain plan provisions therein. The court also held that the threshold jurisdictional question regarding the arbitrator's authority to reverse plan benefit denials by the named fiduciaries was for the arbitrator to decide.

---

[3] Railway Labor Act, 45 U.S.C. § 151 *et seq.* (hereinafter "RLA").

[4] The complete text of statutes and regulations cited in this section can be found in Appendix E.

[5] Federal jurisdiction in the district court was invoked under 45 U.S.C. §§ 151, 153 and 184, and 28 U.S.C. §§ 1331, 1337, 2201 and 2202.

A. Exclusive Claims Review Procedures Under The Plan Pursuant To Section 503 of ERISA

The respondents in this case, the Air Line Pilots Association ("ALPA"), Donald R. Hazeltine ("Hazeltine") and Earl E. Meech ("Meech")[6] seek System Board review[7] of disability benefit claims denied by and pursuant to the Delta Air Lines, Inc. Pilots Disability and Survivorship Plan ("Plan"), an ERISA employee benefits plan. As required by ERISA (29 U.S.C. § 1022; 29 C.F.R. § 2560.503-1 (b) (1) (ii)), the Plan's SPD clearly sets forth the exclusive procedures for review of denied claims. These procedures do not provide for arbitration of denied claims, but instead establish an independent review of claims through Plan procedures by named Plan fiduciaries with a right of review in federal court under section 502 of ERISA.

To receive disability benefits under the Plan, a pilot must submit an application for benefits to the Plan. The application is reviewed, an initial determination is made, and the claimant is notified of the result. If the claim is initially denied, a written explanation of the reasons for the denial is sent to the claimant who may appeal the decision to the Administrative Subcommittee of the Plan. If the claim is denied by the Administrative Subcommittee, the claimant has 90 days to appeal the denial to the entire Administrative Committee. At both levels of review, claimants or their representatives may review pertinent documents, and submit comments and documentary evidence. If the Administrative Committee denies the claim, the claimant may challenge the decision in federal court pursuant to section 502 of ERISA. Nothing in the Plan or the SPD provides for arbitration of Plan disputes.

The written terms of the Plan explicitly provide that, subject only to the right to bring an action in United States District Court, the decisions of the Administrative Committee are final: "The decisions of the Administrative Committee as to interpretation and application of the Plan shall be final." The Administrative Committee shall have the power to "in-

[6] Collectively referred to as "ALPA" or "respondents."

[7] "Arbitration" and "System Board review" are used interchangeably throughout this petition.

terpret the Plan, and decide all questions of eligibility of any Employee to participate in the Plan or to receive benefits under it, its interpretation thereof in good faith to be final and conclusive." Similarly, the exclusive authority to interpret the Plan lies with the Plan Administrator: "The operation and administration of the Plan . . ., the exclusive power to interpret it, and the responsibility for carrying out its provisions are vested in an Administrative Committee . . . ." (J.A. 82-83)[8] Thus, the SPD concludes: "The above review procedures are the exclusive procedures provided under the Plans." (J.A. 90)

These provisions of the Plan are incorporated into the collective bargaining agreement between Delta and ALPA ("CBA" or "Agreement") by reference. Thus, the Plan language giving the Administrative Committee the final and exclusive authority to determine eligibility for benefits has been made part of the CBA between the parties. The CBA also contains an arbitration clause which provides for System Board review of "disputes between any pilot covered by [the] Agreement and the Company growing out of grievances or out of interpretation or application of the terms of [the] Agreement." (J.A. 46)

B. The Plan Denied Meech's And Hazeltine's Claims For Benefits For Which They Applied After Their Employment With Delta Terminated.

The respondents in this case worked for Delta as airline pilots. Both pilots were fired by Delta for misconduct.[9] Both

[8] "J.A." citations are to the Joint Appendix filed in the court below.

[9] On January 24, 1985, Meech was indicted by a federal grand jury in Dallas, Texas on eleven felony charges involving fraud and conspiracy for filing false insurance claims. (J.A. 114-15) On February 8, 1985, Meech was suspended by Delta without pay following his indictment on these criminal charges. On May 30, 1985, a superseding indictment added three additional counts. On June 28, 1985, Meech pled guilty to two felony charges and admitted that he had filed fraudulent insurance claims alleging the theft of a boat, motor, and trailer which were in his possession. (J.A. 120) Upon his conviction of fraud and sentencing to jail for five years, Meech's suspension at Delta was converted into a termination, effective July 31, 1985.

Hazeltine was placed on a one-year disciplinary suspension on June 1, 1983, after 15 years of disciplinary infractions, resulting in approximately 20 registered complaints, which had triggered two prior suspensions.

terminations were upheld by a System Board. Both pilots submitted claims for permanent disability benefits *after* they were terminated.[10] The claims of both pilots were fully processed through the dispute resolution procedures of the Plan and were denied by the Plan at each level of review. The Plan denied respondents' claims because at the time of their terminations, neither pilot was disabled within the meaning of the Plan.[11]

At the System Board hearing regarding the propriety of Hazeltine's termination, the issue of System Board jurisdiction to award disability benefits was directly addressed and representatives of both ALPA and Delta agreed that the System Board did not have the jurisdiction to consider a claim for disability benefits.[12] The System Board upheld the

(J.A. 98-105) As part of this one-year suspension, Delta required Hazeltine to seek psychiatric treatment for a personality disorder which interfered with his ability to get along with people. *Id.* On June 18, 1984, Hazeltine's psychiatrist reported that he could "see no medical or psychological reason at this time that would prevent [Hazeltine's] return to full duty . . . ." (J.A. 102) Hazeltine was reinstated as of June 20, 1984, and returned to work with the following understanding as stated in a memorandum to Hazeltine from Delta: "You were expressly advised . . .[that this was your] *final* opportunity to correct your attitude toward your job and fellow employees." Declaration of Odom and Davis at Exhibit 21 (emphasis in original). On July 3, 1984, while reporting for his first line flight since his reinstatement, Hazeltine resumed his pattern of misconduct, resulting in his termination. (J.A. 98-103)

[10] Before he was terminated, Meech submitted a claim for temporary disability benefits which was denied because he claimed to have become temporarily disabled more than thirty days after he was placed on a disciplinary suspension, which made him ineligible for benefits. After he was terminated, Meech claimed he had become permanently disabled.

[11] Under the Plan, a pilot becomes disabled when the FAA determines that the pilot does not meet FAA medical requirements for a first class medical certificate. (§ 1.08 at J.A. 72) When their employment with Delta terminated, both pilots still held FAA first class medical certificates and therefore were not disabled under the Plan.

[12] At the hearing Delta objected to Hazeltine's request for disability benefits on two separate grounds:

> First, there's a very basic legal problem. The Board does not have jurisdiction to consider medical disability or to award medical disability. *Under the pilot's plan, which is governed by federal statute and is highly regulated, the only authority that has or may consider a disability claim would be the Administrative Committee. Again, this Board just does not have jurisdiction to consider that claim.*
>
> Second, the Company has not been put on notice . . . that there's going to be a claim for disability.

(footnote continued)

propriety of Hazeltine's discharge[13] and also stated that even though he was no longer an employee, Hazeltine was not precluded from applying for disability benefits to the disability Plan and the Administrative Committee was not precluded from considering his application for benefits nor was bound by Hazeltine's current employment status in making its determination. The System Board did not state that if Hazeltine applied for disability benefits, they should be awarded.

On April 28, 1986, after the Plan denied their claims for disability benefits, Hazeltine and Meech filed nearly identical grievances with Delta protesting the denial of disability benefits by the Plan's Administrative Committee. The factual predicate for both grievances filed under the CBA was that under the Plan "[t]he Administrative Committee denied my application for disability benefits . . . ." (J.A. 111, 126) Delta denied the grievances and refused to participate in any System Board proceedings. "Because applications for disability benefits lie exclusively within the province of the Administrative Committee, it is clear that the System Board has no jurisdiction over these matters, and accordingly the grievances cannot be entertained." (J.A. 129) Instead of availing themselves of court review of ERISA plan determinations pursuant to section 502(a), respondents filed this action to compel Delta to arbitrate the decisions of the Plan's Administrative Committee.

Declarations of Odom and Davis at Exhibit 27 at 30-31 (emphasis added).

In response, Robert H. Drew, the ALPA Contract Administrator who represented Hazeltine before the System Board, acknowledged the exclusivity of Plan provisions and procedures in resolving disability claims.

[By Mr. Drew:]

> *Mr. Kassin is totally correct in his position that says that the System Board is not the proper body to consider whether Captain Hazeltine is disabled or not.* We all recognize that that obligation and responsibility rests with the federal air surgeon, and *we also recognize that the pilot's disability retirement plan sets forth very precise conditions which must be met for purposes of receiving disability retirement.*

Id. at 33-34 (emphasis added).

[13] "The general pattern of the grievant's unsatisfactory conduct during his 16-year employment with the Company together with the previous discipline imposed by the Company and the war. ings received by the grievant justify the Company's action in terminating the grievant's employment for his most recent incident of misconduct." (J.A. 97)

C. The District Court Found For Delta On The Basis Of The Incorporation Of Plan Language Into The CBA, And The Court Of Appeals Reversed For The Same Reason.

The district court held that disputes under an ERISA employee benefit plan are not arbitrable where plan terms designating exclusive plan fiduciaries with "final" and "conclusive" authority to decide benefit claims are incorporated into a collective bargaining agreement. The district court concluded,

> that the provisions of the Collective Bargaining Agreement incorporating the Delta Pilots Disability and Survivorship Plan therein by reference (Section 26 A), in conjunction with the provisions of the Plan itself which vest in the Administrative Committee thereof the exclusive power to interpret it, and to decide all questions of eligibility to receive benefits thereunder (Sections 11.01, 11.07(b)), render this dispute with respect to disability benefits cognizable only by the Committee and not subject to arbitration before the System Board . . . .

App. B.

The court of appeals reversed, holding that, notwithstanding a plan's express terms reserving to itself claims dispute resolution, the mere incorporation of a plan and recitation of its terms in the CBA render such benefit claims arbitrable.[14] (App. A at 13-18) Nevertheless, the court declared that:

> Our decision should in no way be interpreted as binding on the System Board as it reviews the Meech and Hazeltine grievances. The System Board might well determine that the exclusivity and finality language in the Plan means that all (or some portion) of disputes over the Plan's administration are not normally to be submitted to the System Board.

Id. at 18-19.

[14] The court of appeals properly held that the RLA did not require arbitration of disputes over employees' claims for ERISA plan benefits in all cases — *i.e.*, that the parties have the right to establish independent claims review procedures under ERISA — and that such disputes "were not arbitrable at all if not arbitrable under the collective bargaining agreement." (App. A at 8-9, n.2)

Thus, the court below remanded to the arbitrator not only the merits of the Hazeltine and Meech claims but also the threshold jurisdictional question of whether the parties agreed to arbitrate claims for disability Plan benefits. The court concluded that it is up to the arbitrator and not the courts to determine whether the description of plan procedures as "exclusive" and "final" excludes benefit claims from the CBA's arbitration clause. The court's decision deferring this jurisdictional issue to the arbitrator squarely conflicts with Supreme Court precedent, including the *Steelworkers Trilogy, (United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)) and most recently, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986).

REASONS FOR GRANTING THE WRIT

The decision below unravels ERISA—what this Court has repeatedly called a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corp.* 446 U. S. 359, 361 (1980); *Massachusetts v. Morash*,____ U. S.____, 109 S. Ct. 1668 (1989); *Firestone Tire & Rubber Co. v. Bruch*, ____U. S.____, 109 S. Ct. 948 (1989); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U. S. 211, 214 (1986). An essential element of ERISA is the express designation of plan fiduciaries to administer ERISA plans. With respect to the disposition of claims under a plan, section 503 of ERISA requires that a plan identify the "appropriate named fiduciary." The disability plan at issue expressly designates the decisions of such fiduciaries as final and exclusive. The court below has added the arbitrator as the final, yet *de novo*, level in the claims review process notwithstanding the absence of any reference to arbitration in the Plan or the SPD.

The effects of the court's decision are far reaching. It is axiomatic that under ERISA, plan terms govern the disposition of substantive and procedural issues under the plan. *See*

infra at 13-18. The court below would have it otherwise. In grafting the arbitral mechanism onto "final" and "exclusive" plan procedures, the court virtually ignores the exclusivity provisions of the Plan. To so turn a blind eye to plan provisions undermines the fundamental purpose of ERISA—substantive and procedural certainty as reflected in plan terms. The decision below renders plan terms nugatory, designates new fiduciaries not named in the plan, and creates a duplicative dispute resolution process which requires the use of *both* of the alternative claims review procedures authorized by ERISA. Such a result fosters confusion and uncertainty, is clearly inconsistent with Supreme Court precedent and creates a conflict with other circuit law.

The impact of this decision is not limited to ERISA. It affects the broader scope of labor-management relations as a whole. In an unbroken line of precedent, from the *Steelworkers Trilogy* to *AT&T*, it has been well settled that the jurisdictional question as to whether, by "*express exclusion* or other forceful evidence," a specific dispute is not subject to arbitration should be decided by the courts and not referred to the arbitrator, *AT&T*, 475 U.S. at 652. *See also Bonin v. American Airlines, Inc.*, 621 F. 2d 635 (5th Cir. 1980) (court decides dispute is not arbitrable under the RLA); *Air Line Pilots Association v. Northwest Airlines, Inc.*, 627 F. 2d 272 (D.C. Cir. 1980) (court determines which portion of the dispute over benefits is arbitrable under the RLA).

The court below determined that, in the final analysis, it is for the arbitrator to decide whether the incorporation of "exclusive" and "final" Plan procedures into the CBA yields authority over benefit claims to the arbitrator or constitutes express exclusion of such claims from arbitration. Although *the court concluded* that the incorporation and recitation of such "final" and "exclusive" plan procedures in the CBA makes the claims arbitrable, the court nevertheless deferred the issue to the arbitrator. Such a result does violence to labor-management relations and cannot be squared with the decisions of this Court and other circuits.

A. The Decision Below, Which Ignores The Provisions Of The Plan Vesting In Named Fiduciaries The "Final And Exclusive" Authority To Decide Claims For Benefits Under The Plan: (1) Undermines ERISA's Mandate That Plan Terms Govern Plan Claims; (2) Conflicts With Other Circuit Law; And (3) Creates Duplicative And Conflicting Claims Review Procedures.

The principal holding of the court below is that by virtue of a plan's incorporation into a CBA and the recitation of certain plan provisions in a CBA, arbitrators have jurisdiction under the CBA's general arbitration provision to award benefits under the plan, notwithstanding plan terms which designate plan fiduciaries with exclusive and final authority to resolve such claims. Such a result does violence to ERISA's fundamental purpose that plans be administered by named fiduciaries according to their written terms.

Moreover, ERISA clearly contemplates that plans may choose between arbitration and exclusive plan mechanisms to resolve benefit claims. The court below obliterates that choice and requires an arbitral remedy for all plans that are referred to and whose provisions are copied into a CBA. The court's decision will affect many hundreds of employee welfare and pension benefit plans and many thousands of claims.[15] While ERISA provides a choice between dispute resolution procedures, it does not provide for two independent and parallel dispute resolution mechanisms. Duplicative and conflicting claims resolutions, interpretations of plan terms, and standards of review are the inevitable outcome of the court's decision.

[15] Almost all of those employers responding to a member survey by the National Association for Manufacturers offer employee benefit plans which are incorporated into and described by collective bargaining agreements. Only six plans, out of 338, provide for arbitration of disputes over plan benefits; the remaining 333 are independently administered. *See* Appendix F.

1. ERISA Mandates That Plan Terms Govern The Disposition Of Plan Claims, Including The Identification Of Plan Fiduciaries Who Administer The Plan.

It is beyond cavil that ERISA employee benefit plans are to be administered in accordance with their written terms. The language of the statute could not be clearer:

> (a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.
>
> (2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

ERISA § 402(a), 29 U.S.C. § 1102(a). In addition, ERISA sets forth the requirement that employee benefit plans contain procedures allocating responsibility for their operation and administration:

> (b) Every employee benefit plan shall—
>
> * * * *
>
> (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1)).

Id. at § 1102(b)(2).

> (c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries,

> and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1).[16] ERISA also requires plan fiduciaries to comply with plan terms:

> [A] fiduciary shall discharge his duties with respect to a plan ... in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV.

ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

Furthermore, the case law is legion that ERISA plans must be administered in a manner which is consistent with their written terms.[17] *Birmingham v. SoGen-Swiss Interna-*

[16] Underscoring the clear language of the statute, the legislative history also supports Congress' conclusion that the provisions of the plan and the SPD be in writing, and that they fully and accurately describe benefits and claims review procedures available to plan participants. *See* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Admin. News 5038, 5041. Further, the legislative history makes clear that any delegation or allocation of fiduciary duty must be specifically and expressly provided for by the plan's written terms. *Id.* at 5081-82 ("*The plan* must specifically allow such allocation or delegation, and *the plan* must expressly provide a procedure for it.") (emphasis added).

[17] *See e.g. Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (ERISA mandates that a plan be in writing; claim of an alleged oral modification of pension plan dismissed because to allow such a claim "would threaten the stability and solvency of many plans upon which so many other emloyees are dependent"); Dzinglski v. Weirton Steel Corp.,_____F.2d_____, 1989 WL 51356 (4th Cir. 1989) (Retirement Committee did not breach fiduciary duty because it acted in accordance with the terms of the plan); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988) (plaintiff is only entitled to the benefits promised under the express terms of the plan); *Davidian v. Southern California Meat Cutters Union and Food Employees Benefit Fund*, 859 F.2d 134 (9th Cir. 1988) (claim against fund was dismissed in the face of contrary, written plan provisions); *Cummings v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 389 (7th Cir.), *cert. denied*, 479 U.S 1008 (1986) (divorce decree may not override written provisions of a plan; "[f]orcing trustees of a plan to pay benefits which are not part of the written terms of the program disrupts the actuarial balance of the Plan and potentially jeopardizes the pension rights of others legitimately entitled to receive them"); *Nachwalter v. Christie*, 805 F.2d 956, 959-961 (11th Cir. 1986) (alleged oral agreement which seeks to vary the express written terms of an ERISA plan is not enforceable; central policy goal of ERISA would be undermined if such modifications were allowed; plan not amended in accordance with plan

tional Corporation Retirement Plan, 718 F.2d 515 (2d Cir. 1983) is directly analogous to this case. In *Birmingham*, the Second Circuit held that the Company's Board of Directors lacked the power to overrule the Retirement Committee's interpretation of the pension plan because such power was not explicitly reserved with precision in plan documents. Unlike the case at bar where plan documents yield no authority to the arbitrator, in *Birmingham*, plan language indicated that the Committee's actions were "subject to the Board of Directors." However, *in the absence of a defined procedure set out in the plan for an appeal from the Committee to the Board*, the Second Circuit concluded that the Committee's fiduciary decisions could not be routinely appealed to the Board. In so concluding, the Second Circuit held that ERISA would be violated if the Board of Directors were given the power to override interpretations of the plan by the designated plan fiduciaries — without *explicit* and *precise plan* language delegating such authority to the Board.

> However, we need not define the precise relationship between the Board and the Retirement Committee under the terms of the Plan since the Retirement Committee's authority is derived from ERISA as well as from the Plan. Under ERISA, a

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procedures); *Delgrosso v. Sprang and Company*, 769 F.2d 928, 930-936 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986) (employer breached fiduciary duty by failing to administer the plan in accordance with the documents governing the plan); *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (doctrine of estoppel not applied to pension benefits in recognition of the fact that "[t]he actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan."); *Johnson v. Central States Southeast and Southwest Areas Pension Fund*, 513 F.2d 1173 (10th Cir. 1975) (judgment of district court enforcing benefits per booklet and letter which are inconsistent with plan terms is reversed as clearly erroneous); *Saret v. Triform Corp.*, 662 F. Supp. 312, 316 (N.D. Ill. 1986) (the writing requirement is a "central feature" of ERISA such that enforcement of agreements which conflict with the express terms of the plan conflicts with ERISA's "basic purpose and design"); *Schoenholtz v. Doniger*, 628 F. Supp. 1420, 1428-1430 (S.D.N.Y. 1986) (plan trustees held liable for, *inter alia*, failure to fulfill obligations as trustees in accordance with the specific written instructions of the plan); *Wilken v. AT&T Technologies*, 632 F. Supp. 772 (E.D. Mo. 1984), *aff'd*, 822 F.2d 1095 (8th Cir. 1987) (practice of offsetting plan benefits with workers compensation benefits unlawful because it was not provided for in the plan).

> "named fiduciary" has the "authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). We have no difficulty in concluding that these powers, even apart from Section 10.2(b) of the Plan, include the rendering of interpretations as to the meaning of the provisions of the Plan. We also have no difficulty in holding that the "subject to" language does not by itself alter the statutory grant of authority embodied in Section 1102 (a)(1).

Id. at 521-522. Moreover, the court expressed a concern that any other result would undermine ERISA's statutory scheme which focuses responsibility for plan operations in clearly identified plan fiduciaries.

> A valid plan under ERISA must designate "a named fiduciary" so that responsibility for managing and operating the Plan — and liability for mismanagement — are focused with a degree of certainty. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5075-78, 5081. This is in the interest of the beneficiaries, but it is also in the interest of a sponsoring corporation .... The very purpose of requiring the designation of a "named fiduciary" would thus be undermined by [the Company's] interpretation. It would diffuse responsibility where Congress intended to focus it .... [S]uch a reservation in derogation of a statutory grant of power must be done *explicitly and with precision* ... the "subject to" language fails to accomplish that end.

Id. at 522 (footnote omitted) (emphasis added).

In *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488 (2d Cir. 1988), the court dismissed a claims for benefits that were contrary to the express terms of the plan because to ignore plan language is to undermine ERISA's framework and reduce ERISA protections:

> Plaintiffs' argument, if accepted, would undermine ERISA's framework which ensures that plans be

> governed by written documents filed under ERISA's reporting requirements and that SPDs, drafted in understandable language, be the primary means of informing participants and beneficiaries.
>
> * * * *
>
> Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale.
>
> * * * *
>
> While these plaintiffs would be helped by a decision in their favor, such a ruling would not only fly in the face of ERISA's plain language but would also decrease protection for future employees and retirees.

Id. at 492.

It follows *a fortiori* that ERISA is violated if an arbitrator is allowed to review eligibility determinations and plan interpretations made by the designated fiduciaries of the plan, when plan language reserves for the designated fiduciaries the "exclusive" power to interpret the plan and to decide all questions of eligibility for benefits, such decisions to be "final and conclusive."

This Court has recently underscored the over-arching importance of plan terms in defining the standard of court review of benefit determinations:

> [T]he validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue. Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Firestone Tire & Rubber Co. v. Bruch, ____U.S.____, 109 S. Ct. 948, 956 (1989). The Court has unmistakably concluded

that plan terms govern the validity of benefit claims, and that plan terms designating named fiduciaries even govern the standard of review to be applied by a court in an appeal of such claims. It therefore follows that plan terms designating an exclusive plan procedure and fiduciaries for resolving benefit claims must control the procedural disposition of such claims.

In contravention of ERISA, the court below holds that explicit provisions contained in a plan and described in the SPD,[18] are irrelevant to a court's analysis of the procedures for resolving benefit claims, merely because that plan is incorporated by reference into a collective bargaining agreement and certain plan provisions are recited therein. In so holding, the court of appeals renders nugatory the "exclusive," "final" and "conclusive" power to determine eligibility for benefits granted in plan documents to the designated plan fiduciaries. This Court should grant certiorari in order to prevent the erosion of fundamental protections guaranteed by ERISA to participants, sponsors and administrators of employee benefit plans, that an ERISA plan must be administered by the named fiduciaries in accordance with plan documents.

2. The Decision Below Conflicts With Circuit Law Allowing ERISA Plans To Establish Independent Claims Review Procedures.

The court below holds that the Plan is maintained pursuant to the CBA and, therefore, that the CBA's arbitral mechanism trumps the Plan's exclusive dispute resolution mechanism. In so holding, the D.C. Circuit's opinion directly conflicts with the Fifth Circuit's opinion in *Bonin v. American Airlines, Inc.*, 621 F.2d 635 (5th Cir. 1980) ("Bonin"). In *Bonin*, the Fifth Circuit concluded that *plan terms* govern the procedures for resolving plan disputes; here, the court ignores

[18] The SPD, in addition to the Plan, details a claims review procedure which is independently administered and makes no provision for arbitration of disputes over plan benefits. Pursuant to section 102 of ERISA and Labor Department regulation, 29 C.F.R. § 2560.503-1(b), the SPD must detail the claims review procedure and provide for either arbitration of plan disputes or independent administration of plan disputes.

plan terms because they were incorporated into the CBA. The *Bonin* court held:

> Congress by enactment of ERISA endorsed in effect two alternative methods of administering pension plan claims for employers whose collective bargaining disputes are governed by the Railway Labor Act: (1) arbitration of employee pension claims or (2) independent administration of claims by the pension plan administrator with a federal right of review pursuant to ERISA:
>
> > "The most that can be gathered from . . . [ERISA's] background is that Congress did not wish to require *all* benefit plans to offer an arbitral remedy, nor did it desire to make it possible for any collective bargaining agreement, no matter in what industry or business, to make arbitration compulsory."
>
> *Air Line Pilots Ass'n v. Northwest Airlines, Inc.*, . . . [627 F.2d 272 (D.C. Cir. 1980)] (emphasis in original). Since the pension plan in this case is not maintained pursuant to a collective bargaining agreement, the district court has jurisdiction of plaintiff's pension claim under ERISA.

Id. at 639.[19]

The D.C. Circuit concludes that the Plan is "maintained" pursuant to Delta's CBA with ALPA because part of the Plan is "reproduced in the contract" (App. A at 16) and because

[19] In *Bonin*, the Fifth Circuit recognized that ERISA gives the parties a choice of dispute resolution mechanisms. The choice made by Delta and ALPA is reflected in the provisions of the Plan. Through the collective bargaining process ALPA has tried to change these provisions by proposing that a specialized System Board be created to resolve "all issues arising from disputes over retirement, disability, medical insurance and other employee benefits." (J.A. 148) Delta has not agreed to this proposal and ALPA has ultimately agreed to a contract which continues to provide for independently administered employee benefit plans. If ALPA wants to change the Plan's dispute resolution process, it must do so with Delta's agreement through the collective bargaining process. ALPA should not be allowed to achieve through this lawsuit what it has failed to achieve through collective bargaining.

the Plan is incorporated by reference into the CBA. *Id.* at 18. According to the D.C. Circuit, the simple expedient of duplication of Plan terms and incorporation of a Plan into a CBA transforms the Plan into one "maintained" pursuant to the CBA.

In so holding, the court below ignores the *Bonin* standard for distinguishing between plans "maintained" pursuant to a collective bargaining agreement and those that are independently administered apart from the collective bargaining agreement. That standard is *not* whether the plan is incorporated by reference or reproduced by duplicating machine. Rather, it is whether *the plan provides* that the arbitral machinery in the collective bargaining agreement will be used to resolve benefit disputes. *See supra* at 13-18. The court below even ignores prior D.C. Circuit precedent (*Air Line Pilots Ass'n v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980)) which had been recognized and properly understood by the Fifth Circuit in *Bonin*. Thus, as described in *Bonin*, "the parties [in *Northwest*] agreed *as part of their pension plan* that the adjustment board would hear all disputes arising out of the application and interpretation of the pension plan." 621 F.2d at 639 (emphasis added). As the district court, affirmed in relevant part by the court of appeals in *Northwest*, concluded:

> The parties have also agreed *as part of their collectively bargained pension plan* that, "[T]he Retirement Board shall hear all disputes arising out of the application and interpretation of the Plan . . . ." Amended Pension Plan, section 9.3.

Air Line Pilots Ass'n v. Northwest Airlines, Inc., 444 F. Supp. 1138, 1141 (D.D.C. 1978) (emphasis added). The conflict between the court below and *Bonin* is clear. Under *Bonin*, a plan is independently administered unless *the plan itself provides* for arbitral remedies to resolve claim disputes. Here, the Plan does not provide for arbitration. Accordingly, *Bonin* would require benefit disputes to be appealed directly to the courts under section 502 of ERISA rather than to an arbitrator.

Moreover, although the court below recognizes *Bonin* as the "leading case," it fails to distinguish the exclusivity language of Delta's Plan from the exclusivity language of the plan in *Bonin*. There, the plan read in relevant part: "Notwithstanding any other provision of this Plan, neither the interpretation of the Plan nor its administration shall as such be within the jurisdiction of [the collective bargaining agreements]," *Bonin, supra*, 621 F.2d at 636.[20] Thus, the *Bonin* plan stated, in the negative, that the interpretation and administration of the plan *shall not* be within the jurisdiction of the *Bonin* agreement. Delta's Plan affirmatively provides, in numerous provisions, that the Administrative Committee's "interpretation," "application," "operation" and "administration" of the Plan are "exclusive," "final" and "conclusive." For example, the Delta Plan states: "The operation and administration of the Plan . . . the exclusive power to interpret it, and the responsibility for carrying out its provisions are vested in an Administrative Committee . . . ."

Whether a plan is independently administered should not depend on whether the plan uses proscriptive language, as in *Bonin*, or prescriptive language, as in the case at bar. Indeed, the Supreme Court has recognized that there are two ways to exclude a matter from the ambit of arbitration:

> A specific collective bargaining agreement may exclude contracting out from the grievance procedure. *Or a written collateral agreement* may make clear that contracting out was not a matter for arbitration.

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584 (1960) (emphasis added). The Plan in this case is a written collateral agreement which makes it clear that claim disputes are not a matter for arbitration.

[20] In the very same provision, the *Bonin* plan also stated that "The Administrator shall not administer the Plan in any manner inconsistent with a final determination under [the collective bargaining agreements]." *Id.* Despite the latter provision, the court in *Bonin* held that the *Bonin* plan was not maintained pursuant to a collective bargaining agreement and that the plan administrator did not even have to "defer action on Mr. Bonin's pension claim until a final determination is made by the . . . System Board . . . regarding the arbitration of the plaintiff's discharge." *Bonin*, 621 F.2d at 639.

The Plan's words of exclusivity are equivalent to words of exclusion. [21] *See Halstead & Mitchell Co. v. United Steelworkers of America*, 421 F.2d 1191 (3d Cir. 1969).

This Court should grant certiorari to reconcile the conflict between the decision below and the Fifth Circuit's decision in *Bonin* in order to restore certainty to the administration of employee benefit plans.

3. The Decision Below Creates Duplicative And Conflicting Claims Review Procedures.

The court's decision to inject the arbitrator into plan-designated claims review procedures profoundly affects the day-to-day administration of employee benefit plans. In this case, Meech and Hazeltine sought and were denied disability benefits by the fiduciaries named in the Plan and the SPD. Instead of holding that the claimants' right of review, pursuant to Plan language and the SPD, was to appeal the claim denials to the district court under section 502 of ERISA, [22] the court below allows the claimants a second bite at the apple—arbitration of their disability claims. Having failed under Plan terms and exclusive Plan procedures to obtain their benefits, Meech and Hazeltine can pursue their disability claims before the arbitrator. The potential for inconsistency, forum shopping, protracted benefit reviews, and conflicting standards of court review cannot be avoided.

The effect of the decision below is to create two parallel and potentially inconsistent mechanisms for the administration of ERISA plans incorporated into collective bargaining agreements. The same plan terms will be interpreted and

[21] The court of appeals also relies on "the apparent absence of indication in the collective bargaining agreement [in *Bonin*] of an intent to incorporate the plan," which, combined with the proscriptive language, "led the *[Bonin]* court to conclude that the plan was wholly independent." (App. A at 11) There is no indication in *Bonin*, that the Fifth Circuit was presented with the question of incorporation or lack thereof. To the contrary, non-incorporation played no apparent role in the court's conclusion that the plan was not maintained pursuant to a collective bargaining agreement because the parties had not agreed, *as part of their plan*, that the System Board "would hear all disputes arising out of the application and interpretation of the pension plan." *Bonin*, 621 F.2d at 639.

[22] The district court expressly held that its decision did not preclude "judicial review of the merits of the decision of the Administrative Committee . . ." pursuant to section 502 of ERISA. (App. B at n.1)

enforced by designated fiduciaries with exclusive authority under the plan, and arbitrators exercising authority under the CBA. Some claimants will be successful at persuading their unions to invoke the arbitral mechanism. Other claimants may choose to appeal "final" claim decisions directly to the court under section 502 of ERISA. Some arbitrators will be guided by plan terms and will sustain the benefit claim dispositions of exclusive plan administrators. Others may disregard previous interpretations of plan terms and eligibility criteria.[23] Unpredictable plan administration will be the inevitable result of such parallel and independent procedures for the interpretation and enforcement of ERISA employee benefit plans.

Confusion and inconsistency will also extend to court review of benefits claims. In *Firestone, supra,* this Court resolved the standard of review which applies to benefit determinations—a *de novo* standard if the plan does not give to its fiduciaries discretionary authority and the arbitrary and capricious standard if it does. Here, of course, the Plan gives its administrators exclusive and conclusive authority over Plan benefits, but the court below compromises that discretion by the addition of arbitral review. The question that would then have to be resolved under *Firestone* is which standard of review would apply in such a hybrid situation. The issue is further complicated by yet a third, exceptionally narrow, review standard to be applied under the Railway Labor Act to decisions by System Board arbitrators.[24] Thus, depending upon whether a "final" decision by plan administrators is appealed directly to a district court under section 502 of ERISA or whether it is reviewed by an arbitrator, different standards of review will be applied by reviewing courts. Such a result will undermine the uniform and consistent administration of ERISA plans.

[23] Plaintiffs urged below that the arbitrator had the authority, *inter alia,* to ignore Plan eligibility terms requiring that an FAA medical certificate be withdrawn *prior* to discharge before a participant may qualify for a disability benefit. *See* Plaintiffs' Motion for Summary Judgment at 3.

[24] A System Board decision may be set aside only for failure to comply with the requirements of the RLA, failure to confine itself to matters within the scope of its jurisdiction, or fraud or corruption. 45 U.S.C. § 153(First)(q).

* * *

In sum, the Court should grant certiorari because the decision below undermines the foundation of ERISA—that plan terms govern the administration of ERISA employee benefit plans; conflicts with Supreme Court and circuit law; and interferes with the day-to-day administration of ERISA plans.

B. The Decision Below Conflicts With The *Steelworkers Trilogy* And *AT&T* By Deferring To An Arbitrator The Threshold Jurisdictional Question As To Whether The Arbitrator Has Jurisdiction To Award Plan Benefits Notwithstanding The Determination Of The Plan Fiduciaries.

The sweeping impact of the court's holding on the administration of ERISA plans has been described in Argument A. The court below must have recognized the effect of its broad holding. Thus, despite its conclusion that the disputes over plan benefits are arbitrable, the court remanded the Meech and Hazeltine claims asserting that it was "not deciding" (App. A at 18) that their claims, much less all claims, were subject to arbitration. Rather, the court deferred to the arbitrator the question of whether the Plan's exclusivity and finality terms mean what they say — that Plan-designated fiduciaries have exclusive jurisdiction over resolving benefit claims — or whether the arbitrator's jurisdiction extends to such claims by virtue of incorporation of the Plan into the CBA. By allowing the arbitrator to determine the ambit of the arbitrator's own jurisdiction, the court below contravenes thirty years of precedent, from the *Steelworkers Trilogy* to *AT&T*.

As this Court stated in *AT&T*:

> The issue in the case *[AT&T]* is whether, because of *express exclusion* or other forceful evidence, the dispute over the interpretation of Article 20 of the contract, the layoff provision, is not subject to the arbitration clause. *That issue should have been decided by the District Court and reviewed by the*

> *Court of Appeals; it should not have been referred to the arbitrator.*

AT&T, supra, 475 U.S. at 652 (emphasis added).

In referring the meaning of the Plan terms "final" and "exclusive" to the arbitrator (App. A at 19), the court below made the identical error made by the Seventh Circuit in *AT&T.* It was incumbent on the court below to decide what this Court has called the "threshold question" (*AT&T, supra* at 649), whether these terms constitute an "express exclusion" of disputes over plan benefits[25] from the ambit of the CBA's arbitration clause. To allow the arbitrator to construe plan terms in order to define the arbitrator's and the plan's respective jurisdictions is to violate the mandate of *AT&T.*[26]

Perhaps the court believed that the interpretation of "final" and "exclusive" only goes to the "potential merits of the underlying claims," (App. A at 19) and, therefore, should be properly left to the arbitrator. The interpretation of the Plan's exclusivity provisions, however, has nothing to do with the grievants' eligibility for benefits and everything to do with the proper forum for resolving those grievances, *i.e.*, the very jurisdictional question *AT&T* directs the court to decide.

Accordingly, in light of the clear error by the court of appeals, this Court should follow the course charted in thirty

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[25] As noted *supra,* p.21, express exclusion of a controversy from arbitration can be established by either the collective bargaining agreement itself "or a written collateral agreement." *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 584 (1960). Clearly, the Plan at issue constitutes such a collateral agreement.

[26] Nor is this a case where the parties have provided in their collective bargaining agreement that questions of arbitrability will be decided by the arbitrator rather than the court. To so provide the parties must act "clearly and unmistakably." *AT&T, supra,* 475 U.S. at 649; *See generally* F. Elkouri and E. Elkouri, *How Arbitration Works* 215 (4th ed. 1985) ("Under the federal law the question of substantive arbitrability is for the court when asked to stay or compel arbitration, unless the arbitration clause clearly specifies that the arbitrator shall make the determination."); *LAWI/CSA Consolidators, Inc. v. Teamsters Local 63,* 849 F.2d 1236, 1239 (9th Cir. 1988) ("Courts refer the question of arbitrability to the arbitrator 'only if [the parties] leave no doubt that such was their intent.' ") (citing *Brotherhood of Teamsters Local No. 70 v. Interstate Distributor Co.,* 832 F.2d 507, 510 (9th Cir. 1987)). In the case at bar, the court correctly held that the parties did not clearly and unmistakably leave questions of arbitrability for determination by the arbitrator. (App. A at 9-10)

years of precedent — from the *Steelworkers Trilogy* to *AT&T*. The Court should grant certiorari, reverse the court below, and remand the matter to the district court for further proceedings in accord with its opinion.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

June 16, 1989

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 1, 1988 Decided December 16, 1988

No. 88-7054

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, et al.,
APPELLANTS

v.

DELTA AIR LINES, INC.

Appeal from the United States District Court
for the District of Columbia
(C.A. No. 87-00673)

Eugene B. Granof, with whom *Gary Green* was on the brief, for appellants.

Baruch A. Fellner, with whom *William J. Kilberg* was on the brief, for appellee.

Before: RUTH B. GINSBURG, SILBERMAN and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

SILBERMAN, *Circuit Judge*: The Air Line Pilots Association ("ALPA") brought suit against Delta Air Lines, Inc. in the district court—pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (1982) —seeking injunctive relief to compel arbitration before a System Board of Adjustment of disputes allegedly arising from a collective bargaining agreement between the parties. The district court held that the disputes at issue, which concerned the eligibility of two pilots for disability benefits from the Delta Pilots Disability and Survivorship Plan, were not subject to arbitration before the System Board. The court thus granted summary judgment for Delta, and ALPA appealed. We conclude that the disability benefit disputes arguably do arise under the collective bargaining agreement and are thus subject to arbitration before the System Board. Therefore, we reverse the judgment of the district court.

I.

The Railway Labor Act has governed disputes between air carriers and their employees since 1936. 45 U.S.C. § 181 (1982). The RLA provides that "disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to an appropriate adjustment board." 45 U.S.C. § 184. Each carrier has a duty to establish a board of adjustment. *Id.* The statutory grievance procedure is "mandatory, exclusive, and comprehensive," *Brotherhood of Locomotive Engineers v. Louisville & N.R.R.*, 373 U.S. 33, 38 (1963), and judicial review of a System Board's decision is narrowly limited to three categories provided in the Act. *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 93 (1978); 45 U.S.C. § 153 First (p).[1]

[1] The Act states that an order of a System Board may be set aside only "for failure of the division to comply with the

In section 19 of their 1982 collective bargaining agreement, Delta and ALPA established a System Board of Adjustment in order to comply with the RLA. The agreement states that the Board's purpose is to "adjust[] and decide[] disputes which may arise under the terms of the Pilots' Agreement and which are properly submitted to it." Its jurisdiction includes "disputes between any pilot covered by [the] Agreement and the Company growing out of grievances or out of interpretation or application of any of the terms of [the] Agreement." The Board is composed of four members, two appointed by Delta and two appointed by ALPA. A majority vote of the Board members establishes a final and binding decision on any matter properly before it; in the case of deadlock, the agreement provides for the selection of a fifth Board member from a panel of neutrals established by the parties.

Section 26 of the contract describes retirement, disability, and survivor benefits for the pilots. Two parts of that section are directly implicated in this case. Section 26.A states that "[t]he Company shall pay the full cost of the Delta Pilots Retirement Plan and the Delta Pilots Disability and Survivorship Plan, plans regulated under the Employee Retirement Income Security Act of 1974 ("ERISA"), such plans hereby incorporated by reference into this Agreement," and section 26.C provides that "[a] pilot who becomes disabled prior to his normal retirement date shall be provided a monthly disability benefit from the Delta Pilots Disability and Survivorship Plan equal to fifty percent (50%) of his highest twelve (12) consecutive months of normal earnings during the last thirty-six (36) months of active service as defined in the Plan."

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requirements of [the RLA], for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order." 45 U.S.C. § 153 First (p).

The Delta Pilots Disability and Survivorship Plan provides benefits for pilots employed by Delta. The Plan vests the exclusive power to interpret its terms and the responsibility for carrying out its provisions in an Administrative Committee of at least three members, who are appointed by the Board of Directors of Delta. Of particular relevance to this appeal, section 11.02 of the Plan states that "decisions of the Administrative Committee as to interpretation and application of the Plan shall be final."

Like virtually all employee benefit plans, the Delta Plan is regulated by ERISA, which was passed by Congress in 1974 to establish minimum standards for such plans. 29 U.S.C. § 1001(a) (1982). Administrators of the Plan are designated fiduciaries, *see* 29 U.S.C. § 1102, and ERISA imposes certain duties on them as a matter of federal law. 29 U.S.C. §§ 1102-1113. ERISA also imposes a series of disclosure and reporting requirements to protect the interests of participants and beneficiaries. 29 U.S.C. §§ 1021-1031. Section 502 of ERISA provides for civil enforcement of the various provisions of the Act through actions brought by participants, beneficiaries, and fiduciaries. 29 U.S.C. § 1132(a)(1).

The first of two grievances underlying this dispute involves former Delta pilot Donald R. Hazeltine. Delta discharged Hazeltine on July 23, 1984, after an incident at the Houston airport on July 3, 1984, during which, according to Delta, Hazeltine "created an unnecessary scene with security checkpoint personnel at [the airport] in front of numerous passengers." This episode was the last in a series of events since 1969 which Delta believed made Hazeltine a "constant source of embarrassment to the Company." Hazeltine had been progressively disciplined through suspensions of increased durations, so Delta concluded that termination was warranted after the Houston incident.

Hazeltine appealed the termination of his employment to the System Board, claiming that he should be placed on disability and that his conduct did not justify his termination. The Board sustained Hazeltine's discharge and ruled that the "initial determination of the *medical merits* [of the disability claim] are properly determined by the Administrative Committee of the Delta Pilots Disability and Survivorship Plan." (emphasis added). But the Board concluded that "the grievant shall not be barred from making application for disability under the Delta Pilots Disability and Survivorship Plan; the Administrative Committee of the Plan shall not be barred from considering his application, and that the Administrative Committee shall not be bound by the grievant's current employment status in making its determination." ALPA had sought such a determination, because it feared that the Committee would deny Hazeltine's claim on the ground that he was not disabled at the time of his discharge. When terminated, Hazeltine was arguably not yet "disabled" as that term is defined by both section 26.C.4 of the agreement and section 1.08 of the Plan, because he had not "los[t] his [Federal Aviation Administration] license to fly as an airline pilot," and section 7.01 of the Plan states that "[t]here are no benefits under this Plan in the event of Termination of Continuous Employment."

Hazeltine subsequently applied for issuance of an airman medical certificate from the FAA, which the agency denied on July 18, 1985. He then sought disability benefits under the Plan in August 1985. The Plan's Administrative Committee denied his claim on April 15, 1986, stating that "at the time of the termination of [his] employment with Delta, [Hazeltine] held a first class medical certificate." The Committee reasoned that "the onset of disability must occur during employment," and "no post termination benefits are available under the Plan." Its decision made no mention of the Board's earlier seemingly inconsistent award.

The second underlying grievance was brought by former Delta pilot Earl E. "Ed" Meech. On January 24, 1985, Meech was indicted by a federal grand jury in Dallas, Texas on eleven felony charges of fraud and conspiracy. Delta thereafter suspended him without pay and benefits on February 8, pending resolution of the criminal charges. The company said that the "serious nature of the criminal charges" called into question Meech's "judgment and integrity" and that Meech's preparation of a legal defense would prevent him from giving "undivided attention to [his] duties and responsibilities as a pilot for the Company."

In March 1985, while on suspension, Meech fell from a ladder and seriously aggravated a prior back injury. On the 19th of that month Meech received a "Disability Certificate" from an FAA-certified medical examiner, attesting that Meech was physically unable to perform his job duties. This certificate, however, was not technically equivalent to the denial of an FAA license, which Delta argues is a prerequisite to disability benefits under the Plan and the agreement. In June 1985, Meech was convicted on two felony charges, and Delta converted his suspension into a termination on July 31, 1985. Sometime thereafter, Meech applied for, and was denied, an FAA license.

During his suspension, on July 10, 1985, Meech applied for long term disability benefits under the Plan. Delta denied his claim on August 16, on the ground that his alleged disability commenced after 30 days from the date he was suspended. Although section 4.02 of the Plan, which delineates the requirements for income benefits, does not explicitly include a 30 day limitation period, Delta explained that section 4.02 had been "interpreted to be consistent with the provisions of Section 25.A.1. of the Agreement." The latter section provides that a pilot is eligible for *short term* weekly disability benefits while

under disciplinary suspension only if the disability occurs within the first 30 days of the suspension.

Meech appealed this decision to the Administrative Committee of the Plan, which upheld the decision on a different basis. It wrote to Meech, stating: "With respect to your claim for permanent disability benefits, the Committee noted that through the time of your termination, you had never been denied a first class medical certificate. Denial of such a certificate is required in order to qualify for permanent disability benefits." This is the same reason that the Committee gave for denying Hazeltine's application for benefits.

On May 27, 1986, Hazeltine and Meech both submitted grievances to the System Board for consideration and decision. They alleged that the Administrative Committee's denials of their disability applications violated the collective bargaining agreement. Delta refused to participate in a Board proceeding, however, because in its view "applications for disability benefits lie exclusively within the province of the Administrative Committee, [and] it is clear that the System Board has no jurisdiction over these matters." ALPA then sued to compel arbitration.

II.

As a threshold matter, ALPA maintains that the district court should not have decided whether the grievances are within the jurisdiction of the System Board. Rather, appellant contends that the Board should determine its own jurisdiction in the first instance—in other words, it has primary jurisdiction to decide its own jurisdiction. The court should rule on the Board's jurisdiction, ALPA argues, *only if* the Board's jurisdiction is challenged *after* it has acted. *See* 45 U.S.C. § 153 First (p). ALPA premises its primary jurisdiction argument on the language of the agreement; section 19.C defines the jurisdiction of the Board, and section 19.G.7 provides

that "[t]he Board shall have the authority for the administration and interpretation of this Section of the Agreement."

The Supreme Court has recently announced the general rule—at least in cases arising under the National Labor Relations Act—that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). This is so because "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *Id.* at 648-49. The Court explained that "[t]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Id.* at 649 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964) (citations omitted)).

ALPA argues that the *AT&T* rule should not apply here, because this case arises under the RLA, under which the duty to arbitrate is not only a contractual obligation but a mandatory statutory requirement. We think, however, that the instant dispute really does center on the scope of the parties' contractual grant of jurisdiction to the System Board. As we explained above, the purpose of the Board is to decide disputes arising under the agreement. We have implied previously that arbitration is a matter of contract in an RLA case—at least where a collective bargaining agreement is in effect[3]—because an

[3] ALPA argues in its brief that any claim founded upon some incident of the employment relationship, whether or not it is covered by the collective bargaining agreement, is a "minor dispute"—a term of art under the RLA—which must be submitted to the System Board. To be sure, the Supreme Court has said that some claims independent of those covered

issue need not be subject to arbitration if there is "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Northwest Airlines v. ALPA*, 808 F.2d 76, 82 (D.C. Cir. 1987) (quoting *AT&T*, 475 U.S. at 650 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960))). We are confronted with the question whether the Hazeltine and Meech grievances "arise under the terms of the Pilots' Agreement"—as required by section 19.A of the compact—in which case they would be within the jurisdiction of the System Board, or whether they are really independent disputes between the pilots and the Plan fiduciaries. The arbitrability question here is, in essence, an issue of contract interpretation, and we thus think *AT&T* applies.

Appellant does not really contend that the agreement provides clear and unmistakable evidence of a contractual intent that the court be ousted of primary jurisdiction to determine arbitrability, and we think that the contract certainly does not so provide. The mere statement that the Board shall administer and interpret the section of

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by the agreement are subject to mandatory arbitration. *Elgin, J. & E. R.R. v. Burley*, 325 U.S. 711, 723 (1945). When there is a collective bargaining agreement in effect (as in this case), however, all disputes that arguably are covered by the agreement are minor disputes under the RLA and must go to the System Board. *Railway Labor Executives v. Consolidated Rail Corp.*, 845 F.2d 1187, 1190 (3d Cir. 1988); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087, 1091 (9th Cir. 1988). Insofar as ALPA argues that the RLA gives it the independent right to take to the Board grievances over Plan applications, its theory is contrary to *Bonin v. American Airlines*, 621 F.2d 635 (5th Cir. 1980), which concluded that employees' rights to pension benefits were not arbitrable at all if not arbitrable under the collective bargaining agreement. Moreover, the union's view would undermine the parties' ability to agree to the jurisdiction of the Board through bargaining.

the agreement that includes the jurisdictional provision does not satisfy the *AT&T* test. Such general provisions are quite common in labor agreements, and we feel confident that the Supreme Court meant to require something more direct and explicit in order to deprive the courts of jurisdiction to decide the arbitrability issue before the System Board considers it. The district court was thus correct to address the arbitrability dispute, and we turn now to that question.

III.

Delta asserts that since all claims for disability benefits from the Plan are to be resolved by the Plan's Administrative Committee, denials of such claims are not subject to arbitration before a System Board. The plain language of the Plan, Delta says, shows that it is meant to be administered independently from the collective bargaining agreement. Delta relies on sections 11.01, 11.02, and 11.07 of the Plan, which provide respectively: "The operation and administration of the Plan . . . , the exclusive power to interpret it, and the responsibility for carrying out its provisions are vested in an Administrative Committee . . . ." "The decisions of the Administrative Committee as to interpretation and application of the Plan shall be final." The Administrative Committee shall have the power to "interpret the Plan, and decide all questions of eligibility of any Employee to participate in the Plan or to receive benefits under it, its interpretation thereof in good faith to be final and conclusive."

The union, on the other hand, maintains that the System Board has the power to define the relationship between the Administrative Committee and the Board. It contends that the entire Plan is subsumed within, or incorporated by reference into, the collective bargaining agreement. Therefore, according to ALPA, it may insist that any benefit claim under the Plan follow the same grievance machinery as other claims under the contract.

In support of its argument, Delta points to a group of circuit court decisions that have recognized the independence of pension and disability plans from collective bargaining agreements. The leading case is *Bonin v. American Airlines, Inc.*, 621 F.2d 635, 639 (5th Cir. 1980), in which the court held that since the employee pension plan involved was "not maintained pursuant to a collective bargaining agreement," jurisdiction over employee pension claims was in the district court under ERISA rather than in the System Board under the RLA. In *Bonin*, the pension plan provided that "neither the interpretation of the Plan nor its administration shall as such be within the jurisdiction" of the collective bargaining agreement. *Id.* This statement, combined with the apparent absence of indication in the collective bargaining agreement of an intent to incorporate the plan, led the court to conclude that the plan was wholly independent.

Other courts have reached similar results in cases involving collective bargaining agreements governed by the NLRA. In *RCA Corp. v. Local 241, International Fed. of Prof. & Tech. Engineers*, 700 F.2d 921 (3d Cir. 1983), the court held that where a retirement plan fails to provide an independent basis for mandatory arbitration, and where no provision in the general collective bargaining agreement either brings or seeks to bring the retirement plan within the ambit of the general agreement, disputes over the retirement plan are not arbitrable. The court stressed that "[t]he mere mentioning of the Retirement Plan in the General Agreement is insufficient reason to construe the Retirement Plan as part and parcel of the General Agreement." *Id.* at 927. Similarly, in *Printing Specialties, Local 680 v. Nabisco Brands, Inc.*, 833 F.2d 102 (7th Cir. 1987), the court stated that a "passing reference to the Pension Plan in the collective bargaining agreement does not bring specific pension disputes . . . under the umbrella of the arbitration clause of the agreement." *Id.* at 105. Because

there was no "clear relationship between the Pension Plan and the collective bargaining agreement," *id.*, the court held that grievances over denials of pension benefits were not arbitrable. Against this background, we proceed to analyze the Hazeltine and Meech grievances.

A. *The Hazeltine Grievance*

Even if no other disputes over eligibility for Plan benefits were subject to arbitration, we think it clear that the facts of Hazeltine's grievance require the System Board to entertain his claim. In his appeal of termination of employment to the Board, Hazeltine sought and received a specific provision in the Board's decision that arguably pertains to his eligibility for disability benefits under the Plan. Such an arbitral decision operates as an interpretation of the original agreement; it might be said therefore that a "Hazeltine clause" concerning the relevant criteria to determine *his* eligibility for disability benefits was incorporated into the contract. *Fournelle v. NLRB*, 670 F.2d 331, 344 (D.C. Cir. 1982) ("[a]n award interpreting a collective bargaining agreement usually becomes a binding part of the agreement . . . .") (quoting F. Elkouri & E. Elkouri, *How Arbitration Works* 377 (1973)); *Local Union No. 9735, UMW v. NLRB*, 258 F.2d 146, 148 (D.C. Cir. 1958) (arbitrator's decision generally becomes part of the contract); *Szewczuga v. NLRB*, 686 F.2d 962, 973 n.84 (D.C. Cir. 1982) ("collective bargaining process" includes certain arbitral results as well as the terms of the collective agreement reduced to writing). Delta does not squarely deny that the parties could have agreed in collective bargaining to modify any provision of the pension plan or could do so *ad hoc* for Hazeltine alone. Whether or not Hazeltine could reach the System Board without this earlier Board decision (a question we explore below), the Board's first ruling, which is an interpretation of the collective bargaining agreement, may affect Hazeltine's status vis-a-vis

the Plan, and the Board therefore must hear his grievance.

We do not hold that the Board must interpret its prior decision in any particular way. Delta's counsel maintained at oral argument that it was not the intention of the original Board decision to allow Hazeltine to obtain disability benefits regardless of his employment status at the time he was deemed disabled. If the Board finds that contention determinative, it can so rule. Rather, we hold only that because the agreement now contains the equivalent of a collectively bargained term arguably addressing Hazeltine's eligibility for disability benefits, his grievance is within the mandatory jurisdiction of the System Board.

B. *The Meech Grievance*

The Meech grievance raises substantially different questions than the Hazeltine claim, and it comes much closer to presenting the large issue of whether all claims under the Plan are subject to arbitration before the System Board. We conclude that the Board must entertain Meech's grievance, but in doing so we need not decide whether the System Board has jurisdiction over *all* appeals from denials of benefits by the Plan's Administrative Committee.

We have recently explained in an RLA case that doubts about the arbitrability of issues should be resolved in favor of coverage. *Northwest Airlines v. ALPA*, 808 F.2d 76, 82 (D.C. Cir. 1987). In order to establish that the System Board has no jurisdiction over Meech's claim, Delta must provide "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* (quoting *AT&T*, 475 U.S. at 650 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960))). Unlike the company in *Bonin*, we think Delta has failed to offer "positive assurance" that its disability plan is entirely independent from the collective bargaining agreement.

Significantly, the agreement between Delta and ALPA provides that the Plans are incorporated by reference into the agreement. Section 25.A.1 states that "[e]ach pilot . . . shall . . . be provided with the following group benefits pursuant to the Delta Pilots Disability and Survivorship Plan, and the Delta Pilots Medical Plan, plans . . . *hereby incorporated by reference into this Agreement.*" (emphasis added). Likewise, section 26.A.1 says "[t]he Company shall pay the full cost of the Delta Pilots Retirement Plan and the Delta Pilots Disability and Survivorship Plan, . . . such plans *hereby incorporated by reference into this Agreement.*" (emphasis added). It is generally held that "[w]hen a document incorporates outside material by reference, the subject matter to which it refers becomes a part of the incorporating document just as if it were set out in full." *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1428 (9th Cir. 1986). Both ALPA and Delta seemed to intend this in section 26.6 of the contract, when they referred to the Plans as "contained herein." An explicit incorporation by reference is a far cry from the "mere mentioning of the Retirement Plan in the General Agreement" that courts have found insufficient to bring pension disputes under the umbrella of collective bargaining agreements in *Nabisco* and *RCA*. *See Nabisco*, 833 F.2d at 105; *RCA*, 700 F.2d at 927.

Meech's disability claim, moreover, is based on collectively bargained provisions that appear *both* in the agreement and in the Plan. His request for benefits, as we explained earlier, was eventually denied on the ground that Meech had never been denied a first-class medical certificate before his termination by Delta.[3] Meech now

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[3] Meech also contends that his grievance is within the jurisdiction of the Board, because it involves a dispute over whether his suspension was properly characterized as a "disciplinary" suspension under sections 18.B and 25.A.1 of the agreement. We need not decide that question, however, be-

contends that he clearly was disabled before his discharge, even though he had not technically been denied an FAA license. He also maintains that Delta made independent promises in the contract to provide disability benefits to pilots in his situation. The first relevant provision, section 1.08 of the Plan, which defines "disabled" for purposes of benefits, is reproduced in the agreement, at section 26.C.4.[4] Likewise, section 5.01 of the Plan, which provides that "[a] Participant who becomes disabled . . . shall be entitled to a monthly income benefit . . .," is set forth almost verbatim in section 26.C.1 of the contract.[5] This parallel structure suggests that the key terms

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cause only Delta's original denial of Meech's claim for permanent disability benefits relied on the fact that he had not become disabled during the first 30 days of a "disciplinary suspension." The final resolution of the claim for permanent disability benefits by the Administrative Committee relied solely on the fact that Meech was not disabled at the time of his discharge; it did not rest at all on the nature of Meech's suspension.

[4] Section 1.08 of the Plan provides:

> A Participant shall be considered disabled when he loses his FAA license to fly as an airline pilot, and has been denied restoration of such license by the FAA and has appealed or is in the process of appealing such denial to the FAA at its highest appeal level because of accidental bodily injury or any sickness or disease, including natural deterioration, which shall result in his being prevented from flying as an airline pilot . . . .

Section 26.C.4 of the agreement states:

> A pilot shall be considered disabled when he loses his FAA license to fly as an airline pilot, has been denied restoration of such license by the FAA and has appealed or is in the process of appealing such denial to the FAA at its highest appeal level because of accidental bodily injury or any sickness or disease, including natural deterioration, which shall result in his being prevented from flying as an airline pilot . . . .

[5] Section 5.01 of the Plan states in relevant part:

> A Participant who becomes Disabled in accordance with the definition in Section 1.08 shall be entitled to a monthly

in the Meech dispute were products of negotiation and bargaining. *See Nabisco*, 833 F.2d at 105 ("[W]e might reach a different result if Nabisco and the Union had explicitly bargained over the terms of the Pension Plan and made their agreement a part of the collective bargaining agreement.").

The distinction between the instant case and those relied upon by Delta is highlighted by the *Nabisco* court's statement that, in its case, "[t]he collective bargaining agreement *did not incorporate* the provisions of the Pension Plan." *Nabisco*, 833 F.2d at 105 (emphasis added). The ALPA—Delta agreement doubly incorporated the relevant terms of the Plan: it purported to incorporate the whole Plan by reference, and it literally incorporated the terms relating to disability benefits.[6] The plan in *Bonin* gave "positive assurance" that it was separate from the collective bargaining agreement because it stated that "neither the interpretation of the Plan nor its administration shall as such be within the jurisdiction" of the agreement. *Bonin*, 621 F.2d at 639. Here, by contrast, we have indications to the contrary. Thus, unlike the pension plan in *Bonin*, we think that the Delta Plan—at least the part of it reproduced in the contract—is

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income benefit equal to 50% of the average of his highest twelve consecutive months of normal earnings during the last 36 months of active pay status.

Section 26.C.1 of the agreement says:

A pilot who becomes disabled prior to his normal retirement date shall be provided a monthly disability benefit from the Delta Pilots Disability and Survivorship Plan equal to fifty percent (50%) of his highest twelve (12) consecutive months of normal earnings during the last thirty-six (36) months of active service as defined in the Plan.

[6] We need not and do not decide in this case whether the agreement's statement that the Plans are "incorporated by reference" is sufficient, in and of itself, to give the System Board jurisdiction over *all* benefit claims.

"maintained pursuant to a collective bargaining agreement." *Id.*

In addition to arguing that the Plan's own language shows that it is entirely separate from the agreement, Delta also suggests—unfortunately with no supporting authority—that ERISA prohibits the System Board from reviewing decisions by the Administrative Committee, absent an explicit statement in the Plan that permits such review. In its brief, Delta states rather boldly that "ERISA as it now reads . . . requires that the plan itself state that it is subject to the arbitration provision of a collective bargaining agreement," but it refers us to no statutory language in support.[7] On the contrary, the Department of Labor's own regulations imply the opposite. The rules on claims procedure state that: "In the case of a plan established and maintained pursuant to a collective bargaining agreement . . . [s]uch plan will be deemed to comply with the provisions of paragraphs (g) and (h) of this section [concerning review procedures] . . . if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth . . . a grievance and arbitration procedure to which denied claims are subject . . . ." 29 C.F.R. § 2560.503-1(b)

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[7] Delta does cite *Sinai Hospital v. National Benefit Fund*, 697 F.2d 562 (4th Cir. 1982), for the proposition that an employer and a union cannot alter the terms of a trust agreement "unless the power to do so was reserved when the trust was created or properly amended." *Id.* at 567. *Sinai Hospital* is inapposite, however, because it involved a national, multiemployer trust fund that received contributions from and provided benefits for the employees of 1500 employers. Obviously, one employer and its employees could not change the terms of a multiemployer trust fund. The court's analysis was limited to trust instruments "such as the one involved in th[at] case." *Id.* It does not seem to apply to the situation in this dispute, where the Plan is designed specifically for a particular employer-employee relationship and is maintained, at least in part, pursuant to the corresponding collective bargaining agreement.

(2)(ii) (1986). In short, Delta has not brought anything to our attention establishing that a plan is not "maintained" pursuant to a collective bargaining agreement unless the *plan* itself so states. As we stated earlier, the combined incorporation by reference of the Plan with the duplication of certain Plan terms in the contract satisfy us that this Plan is, at least in relevant part, maintained pursuant to the contract.

Delta also asserts that acceptance of ALPA's position would give the System Board "jurisdiction to compel the Administrative Committee to commit a breach of fiduciary responsibilities under ERISA." Although there may exist some hypothetical case where an order of the Board would be in tension with the Administrative Committee's fiduciary responsibilities, we see nothing in ERISA that prohibits a System Board from hearing appeals from decisions of a plan's administrators. The statute itself says that a fiduciary shall discharge his duties "in accordance with the documents and instruments governing the plan insofar as such document and instruments are consistent with the provisions [of ERISA]." 29 U.S.C. § 1104(a)(1)(D). If, as we have said, the agreement governs the terms of the Delta Plan involved in these grievances, the Plan's fiduciaries must act in accordance with rulings of the Board as long as they are consistent with ERISA. If an order of the Board is inconsistent with the fiduciary, disclosure, or other requirements of the statute, a participant, beneficiary, or fiduciary may bring an independent action in the district court under section 502 of ERISA, 29 U.S.C. § 1132 (1982). *ALPA v. Northwest Airlines, Inc.*, 627 F.2d 272, 277 (D.C. Cir. 1980) (exclusive System Board jurisdiction over benefit claims does not deprive district court of jurisdiction over claims premised on a violation of ERISA); *Bonin*, 621 F.2d at 639 (same).

Finally, it is important to state what the court is *not* deciding. Our decision should in no way be interpreted

as binding on the System Board as it reviews the Meech and Hazeltine grievances. The System Board might well determine that the exclusivity and finality language in the Plan means that all (or some portion) of disputes over the Plan's administration are not normally to be submitted to the System Board. That depends, of course, on how the System Board interprets the Plan's terms—including words like "exclusive" and "final"—which have been brought into its ambit by collective bargaining. The crucial point, it seems to us, is that it is up to the System Board to determine the relationship between the Plan administration and the Board with respect to those aspects of the Plan maintained pursuant to the collective bargaining agreement.[8] As the Supreme Court has made clear, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T*, 475 U.S. at 649. The ultimate decision on the benefit claims is left to the Board.

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For the foregoing reasons, the judgment of the district court is reversed and the case is remanded to that court with instructions to grant ALPA's request for injunctive relief to compel arbitration before the System Board of the Meech and Hazeltine grievances.

It is so ordered.

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[8] Delta also complains that adoption of ALPA's position would generate a cumbersome and duplicative mechanism for resolving disability claims. The simple answer to this "problem" is that the parties are free to agree to any procedures that they choose. Even assuming the extra layer of review at the System Board would be Delta's "procedural nightmare" (which we doubt), nothing in the RLA restricts the parties' right to make such a contract.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Plaintiffs,
v.
DELTA AIR LINES, INC.,
Defendant.

Civil Action No. 87-673

ORDER

Upon consideration of plaintiff's motion and defendant's cross-motion for summary judgment, and the respective oppositions thereto, the Court being of the opinion that the provisions of the Collective Bargaining Agreement incorporating the Delta Pilots Disability and Survivorship Plan therein by reference (Section 26 A), in conjunction with the provisions of the Plan itself which vest in the Administrative Committee thereof the exclusive power to interpret it, and to decide all questions of eligibility to receive benefits thereunder (Sections 11.01, 11.07(b)), render this dispute with respect to disability benefits cognizable only by the Committee and not subject to arbitration before the System Board, and it further appearing to the Court that such an arrangement is lawful, *see Bonin* v. *American Airlines,* 621 F.2d 635 (5th Cir. 1980); *see also Airline Pilots Association* v. *Northwest Airlines,* 627 F.2d 272 (D.C. Cir. 1980), it is, this *21st* day of January, 1988,

ORDERED, that plaintiff's motion for summary judgment is denied; and defendant's motion for summary judgment is granted; and it is

FURTHER ORDERED, that the complaint is dismissed with prejudice.*

THOMAS PENFIELD JACKSON
U.S. District Judge

* This decision is without prejudice to the rights of plaintiffs Hazeltine and Meech to judicial review of the merits of the decisions of the Administrative Committee denying them disability benefits under the Plan.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*, *Appellants*
v.
DELTA AIR LINES, INC.

No. 88-7054
September Term, 1988
D.C. Civil No. 87-00673

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: **RUTH B. GINSBURG, SILBERMAN and D.H. GINSBURG,** Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED,** by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded with instructions, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

Date: December 16, 1988
Opinion for the Court filed by Circuit Judge Silberman.

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*, *Appellants*
v.
DELTA AIR LINES, INC.,

No. 88-7054
September Term, 1988
CA 87-00673

BEFORE: Ruth G. Ginsburg, Silberman and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing, filed January 17, 1989, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY:
Robert A. Bonner
Deputy Clerk

APPENDIX E

ERISA

ERISA § 102, 29 U.S.C. § 1022—Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b). The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1).

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1). Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D).

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the

administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act).

ERISA § 402, 29 U.S.C. § 1102—Establishment of plan

(a) **Named fiduciaries.** (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) **Requisite features of plan.** Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent

with the objectives of the plan and the requirements of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) **Optional features of plan.** Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1), may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

ERISA § 404, 29 U.S.C. § 1104—Fiduciary duties

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

ERISA § 405(c), 29 U.S.C. § 1105(c)—Liability for breach by co-fiduciary

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities.

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a

named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 404(a)(1)

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3).

ERISA § 502, 29 U.S.C. § 1132—Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights

to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) **Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.** (1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respct [respect] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if —

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515.

(c) **Administrator's refusal to supply requested information.** (1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty of up to $1,000 a day from the date of a plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4). For purposes of this paragraph, an annual report that has been rejected under section 104(a)(4) for failure to provide

material information shall not be treated as having been filed with the Secretary.

(d) **Status of employee benefit plan as entity.** (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena [subpoena], or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service. (2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) **Jurisdiction.** (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section. (2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) **Amount in controversy; citizenship of parties.** The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) **Attorney's fees and costs; awards in actions involving delinquent contributions.** (1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party. (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954.

(h) **Service upon Secretary of Labor and Secretary of the Treasury.** A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) **Administrative assessment of civil penalty.** In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations, which shall be consistent with section 4975(f)(5) of such Code within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code.

(j) **Direction and control of litigation by Attorney General.** In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States

Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) **Jurisdiction of action against Secretary of Labor.** Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the the District of Columbia.

ERISA § 503, 29 U.S.C. § 1133—Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claims for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

ERISA REGULATIONS

29 C.F.R. § 2560.503-1 Claims procedure

(a) **Scope and purpose.** (1) This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials,

hereinafter referred to in the aggregate as "claims procedures." Except as otherwise noted, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Employee Retirement Income Security Act of 1974 (the Act).

(b) **Obligation to establish a reasonable claims procedure.** Every employee benefit plan shall establish and maintain reasonable claims procedures.

(1) A claims procedure will be deemed to be reasonable only if it:

(i) Complies with the provisions of paragraphs (d) through (h) of this section, except to the extent that it is deemed to comply with some or all of such provisions under the authority of paragraph (b)(2) or paragraph (j) of this section.

(ii) Is described in the summary plan description, as required by § 2520.102-3,

(iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation or processing of plan claims, and

(iv) Provides for informing participants in writing, in a timely fashion, of the time limits set forth in paragraphs (e)(3) and (g)(3) and paragraph (h) of this section.

(2) In the case of a plan established and maintained pursuant to a collective bargaining agreement (other than a plan subject to the provisions of section 302(c)(5) of the Labor Management Relations Act, 1947 concerning joint representation on the board of trustees):

(i) Such plan will be deemed to comply with the provisions of paragraphs (d) through (h) of this section if the collective bargaining

agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference.

(A) Provisions concerning the filing of benefit claims and the initial disposition of benefit claims, and

(B) A grievance and arbitration procedure to which denied claims are subject.

(ii) Such plan will be deemed to comply with the provisions of paragraphs (g) and (h) of this section (but will not be deemed to comply with paragraphs (d) through (f)) if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference a grievance and arbitration procedure to which denied claims are subject (but not provisions concerning the final and initial disposition of benefit claims).

(c) **Claims procedure for an insured welfare or pension plan.**

(1) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for filing of a claim for benefits with and notice of decision by such company, service or organization.

(2) See paragraph (g) regarding review and final decision on denied claims by insurance companies, insurance services and similar organizations.

(d) **Filing of a claim for benefits.** For purposes of this section, a claim is a request for a plan benefit by a participant or beneficiary. A claim is filed when the

requirements of a reasonable claim filing procedure of a plan have been met. If a reasonable procedure for filing claims has not been established by the plan, a claim shall be deemed filed when a written or oral communication is made by the claimant or the claimant's authorized representative which is reasonably calculated to bring the claim to the attention of:

(1) In the case of a single employer plan, either the organizational unit which has customarily handled employee benefits matters of the employer, or any officer of the employer.

(2) In the case of a plan to which more than one unaffiliated employer contributes, or which is established or maintained by an employee organization, either the joint board, association, committee or other similar group (or any member of any such group) administering the plan, or the person or organizational unit to which claims for benefits under the plan customarily have been referred.

(3) In the case of a plan the benefits of which are provided or administered by an insurance company, insurance service, or other similar organization, which is subject to regulation under the insurance laws of one or more States, the person or organizational unit which handles claims for benefits under the plan or any officer of the insurance company, insurance service, or similar organization.

(4) For purposes of paragraphs (d)(1), (2), and (3) of this section, a communication shall be deemed to have been brought to the attention of an organizational unit if it is received by any person employed in such unit.

(e) **Notification to claimant of decision.**

(1) If a claim is wholly or partially denied, notice of the decision, meeting the requirements of

paragraph (f) of this section, shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan.

(2) If notice of the denial of a claim is not furnished in accordance with paragraph (e)(1) of this section within a reasonable period of time, the claim shall be deemed denied and the claimant shall be permitted to proceed to the review stage described in paragraph (g) of this section.

(3) For purposes of paragraphs (e)(1) and (2), of this section, a period of time will be deemed to be unreasonable if it exceeds 90 days after receipt of the claim by the plan, unless special circumstances require an extension of time for processing the claim. If such an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the initial 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to render the final decision.

(f) **Content of notice.** A plan administrator or, if paragraph (c) of this section is applicable, the insurance company, insurance service, or other similar organization, shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant:

(1) The specific reason or reasons for the denial;

(2) Specific reference to pertinent plan provisions on which the denial is based;

(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and

(4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

(g) Review procedure.

(1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(i) Request a review upon written application to the plan;

(ii) Review pertinent documents; and

(iii) Submit issues and comments in writing.

(2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, . . . that company, service, or organization shall be the "appropriate named fiduciary" for purposes of this section. In all other cases, the "appropriate named fiduciary" for purposes of this section may be the plan administrator or any other person designated by the plan, provided that such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.

(3) A plan may establish a limited period within which a claimant must file any request for review of a denied claim. Such time limits must be reasonable and related to the nature of the benefit which is the subject of the claim and to other

attendant circumstances. In no event may such a period expire less than 60 days after receipt by the claimant of written notification of denial of a claim.

(h) **Decision on review.** (1)(i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary, which holds regularly scheduled meetings at least quarterly, a decision on review shall be made by no later than the date of the meeting of the committee or board which immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a decision may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require a further extension of the time for processing, a decision shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review.

(2) If such an extension of time for review is required because of special circumstances, written notice

of the extension shall be furnished to the claimant prior to the commencement of the extension.

(3) The decision on review shall be in writing and shall include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h)(1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

(i) *Apprenticeship plans.* This section does not apply to employee benefit plans which provide solely apprenticeship training benefits.

THE RAILWAY LABOR ACT

§ 153. National Railroad Adjustment Board

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days'

notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referrable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to

agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with

a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

APPENDIX F

May 12, 1989
16 responses out of 372
questionnaires; (13 with
plans & unions)
April 21, 1989

NAM MEMBER SURVEY

The following survey was developed to respond to the recent case of *ALPA v. Delta Air Lines*, 863 F.2d 87 (D.C. Cir. 1988). In this case the court held that if an employee benefit plan is incorporated by reference into a collective bargaining agreement and plan benefits are described in the collective bargaining agreement, any dispute over plan benefits must be arbitrated even if the plan provides some internal mechanism to review denied claims other than arbitration.

Delta Air Lines is currently in the process of seeking Supreme Court review of this decision. NAM is interested to know how many employers will be adversely affected by this decision, and, if the numbers are large enough, we plan to use this information in aggregate form in an amicus brief supporting Delta's petition.

Thus, we ask you to take a few minutes to complete and return this survey. In general, we seek information about the relationship between employee benefit plans and collective bargaining agreements. If none of your employees are unionized, you need not respond.

1. How many collective bargaining agreements govern your workforce? 547.

2. How many ERISA employee benefit plans, either pension or welfare, do you have which cover unionized employees? 338 + .

3. Please answer the following questions for each ERISA employee benefit plan you have which covers unionized employees.
   Make any additional copies of this survey you need and do not hesitate to elaborate on an answer if you think that necessary.

   Background Information

   Type of Plan_____

   Union Involved_____

   Relation to the Collective Bargaining Agreement

   Is the plan mentioned in the collective bargaining agreement? Almost all.

   Does the collective bargaining agreement indicate that the plan is made part of the collective bargaining agreement is otherwise incorporated by reference into the collective bargaining agreements? Almost all.

Are benefits provided by the plan mentioned or described in the collective bargaining agreement? Almost all.

Is the plan physically attached to the collective bargaining agreement? 8 Yes of 338; Almost all No.

Claims Review Procedures

Can employees whose claims are denied by the plan arbitrate whether the claim was properly denied through the arbitration clause of a collective bargaining agreement? 6 Yes of 338; Almost all No.

If so, does the plan or the summary plan description mention the right to arbitrate claim denials in its description of the claims review procedure (or elsewhere?) Same.

Does the plan and/or collective bargaining agreement provide for both a complete claims review procedure under the plan and a separate arbitration mechanism to resolve the same types of claims under the collective bargaining agreement? Almost all No.

NAME: _____

COMPANY: _____

Please fold and return this self-mailing survey by May 5 to the address on the back.